81-2169

No. 81-

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GILBERT A. HARING, LIEUTENANT, ARLINGTON COUNTY POLICE DEPARTMENT; HENRY W. ALLEN, DETECTIVE; J. R. BADEY, DETECTIVE; ALVIN BEUCHERT, OFFICER; AND STANLEY GARBER, OFFICER,

Petitioners,

vs.

JOHN FRANKLIN PROSISE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can a person who has pleaded guilty in a state criminal court to manufacturing illegal drugs, and who did not raise the validity of search that produced the essential evidence of the crime, subsequently bring an action in a federal court under 42 U.S.C. § 1983 claiming that the search was unconstitutional?

a. By pleading guilty in a state criminal court, does a person waive any right to litigate in a § 1983 action the constitutionality of the search which produced the essential evidence of the crime?

b. Does a conviction based upon a plea of guilty collaterally estop the later litigation in a federal court § 1983 action of the search and seizure claim, where the state court expressly found a sufficient factual basis for the plea and that basis was the evidence produced by the search?

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OPINIONS BELOW

The opinion of the United States Court of Appeals For the Fourth Circuit is now reported at 667 F.2d 1133 (4th Cir. 1981) and it is found in the appendix to this petition at pp. 7a through 34a. The opinion of the Albert V. Bryan, Jr. in the

United States District Court is unpublished but is also found in the appendix to this petition at pp. 35a through 45a.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A panel of the Fourth Circuit Court of Appeals entered its judgment on December 30, 1981. App. at p. 6a. A timely Petition for Rehearing En Banc was filed on January 13, 1981, by the petitioners ("police officers"). On March 19, 1982, the petition for rehearing was denied by the panel and the suggestion of a rehearing en banc was denied by an evenly divided court; a poll was taken and Judges Russell, Widener, Hall, Murnaghan and Chapman voted in favor of a rehearing en banc. App. at p. 5a. 28 U.S.C. § 1254 (1) is believed to confer jurisdiction on this Court to review the judgment of the Fourth Circuit by a writ of certiorari. The circuit court has stayed its mandate pending this application for a writ of certiorari. App. at pp. 1a and 3a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution Amendment IV, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution Amendment XIV, Section 1, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, which provides:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1738 which provides in part:

> "Such Acts, records and judicial proceeding, [of a state] or copies thereof, so authenticated shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

The respondent (Prosise) filed a pro se action in the United States District Court For the Eastern District of Virginia claiming that the police officers violated his fourth and fourteenth Amendment rights while acting under color of law. Prosise alleged that, pursuant to a warrant, the officers illegally searched and seized certain items in his apartment. The action was based upon 42 U.S.C. § 1983, and the district court took jurisdiction of the case apparently pursuant to 28 U.S.C. § 1343.

On the day of the search,[1] the officers had earlier responded to a radio call about a domestic disturbance in an apartment occupied by Prosise and his fiancee, Katherine Denny. The officers arrived just after guns were fired in the apartment. As a result of their investigation, Prosise was arrested at the scene for attempting to kill Denny.

Denny stated to the arresting officers that Prosise was "making PCP" (or "angel dust") and she showed them a baggie she said contained PCP and a closet where there were various chemicals and devices. Detective Allen of the "vice-squad" arrived, examined the closet, noticed a smell of ether, performed a field test, and concluded that these were chemicals and apparatus used to make PCP. He then went to a magistrate and obtained a warrant which authorized a search of the entire apartment to find PCP. The apartment was searched and the chemicals, apparatus, and receipts showing the purchase of certain chemicals used in the manufacturing of PCP were seized. The chemicals were submitted for expert analysis.

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[1]These facts are found in the affidavits of the officers which were submitted in support of their motion for summary judgment. They are also recited in the opinion of the Fourth Circuit. *Prosise v. Haring*, 667 F.2d 1133, 1134-35 (4th Cir. 1981).

Prosise was then charged with possession of PCP and manufacturing PCP. Prosise entered into a plea agreement whereby the charge of possession was nol-prossed in return for a guilty plea to manufacturing PCP.

A hearing was held by the Arlington County Circuit Court by Charles S. Russell where Detective Allen took the stand and testified at length about why the search mentioned above was made, what was seized, and the results of the experts' chemical analysis. These pages from the state court transcript are found in the Appendix at pp. 46a-59a. After hearing the details of the search and seizure, the state trial court said:

> "The court finds the plea of guilty to be voluntarily and intelligently tendered *and finds there is sufficient factual basis; and upon the evidence heard this morning, the Court finds the defendant quilty of the manufacture of phencyclidine as charged in the indictment C-12689."* Emphasis added. App. 58a.

Prosise was sentenced to twenty-five years imprisonment and this conviction is final. (This was later reduced to twelve years.) Prosise then filed this action for damages in the district court under 42 U.S.C. § 1983.

In support of their motion for summary judgment, the officers provided among other things the plea agreement and the transcript of the hearing where Prosise pleaded guilty. The district court granted the officers summary judgment.

The district court chose to base its grant of summary judgment on the search and seizure issue upon collateral estoppel and waiver principles.[2] It reasoned that "The plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful." App. 41a. Further, the court concluded that the "reasoning undergirding this Court's decision in *Tollett v. Henderson,* 411 U.S. 258 (1973), precluded Prosise's assertion of the fourth amendment claim in this § 1983 action.[3] App. at 44a. Judge Bryan stated:

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[2]The district court also concluded that it was convinced on the merits that the search and seizure was lawful. App. at p. 38a. However, it further reasoned that the basis for the grant of summary judgment should be on estoppel grounds rather than on the merits. App. at p. 39a.

[3]The district court reached its decision before this Court decided *Allen v. McCurry,* 449 U.S. 90 (1980) (collateral estoppel applicable in a subsequent § 1983 action involving a search and seizure). Thus at the time of Judge Bryan's decision, the Fourth Circuit's position on the general issue of estoppel in § 1983 actions involving prior state court criminal convictions was *Rimmer v. Fayetteville Police Department,* 567 F.2d 273 (4th Cir. 1977). *Rimmer* concerned the "actual litigation" of the issue in the prior state proceeding and generally embraced the

(footnote continued)

> "If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*." App. at p. 44a.

Prosise appealed to the Fourth Circuit the grant of summary judgment, and that court's decision was rendered on December 30, 1981. The panel reversed the district court and held that Prosise was not barred by his guilty plea from litigating the validity of the search even though it produced the evidence essential to his conviction. The Fourth Circuit in *Prosise* adopted a "flat-rule of nonpreclusion" in § 1983 cases involving guilty pleas for essentially two reasons: first, it concluded that the court in the collateral proceeding would frequently find it impossible to tell if the criminal defendant had adequate "incentive" to litigate the constitutional issue in the state court, and secondly, and more importantly, the federal

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(footnote continues)

position that collateral estoppel only applies to issues which can be presented in a federal habeas corpus proceeding; this assured a person at least one opportunity to have a federal court review the constitutional issue. This Court in *Allen v. McCurry*, rejected this aspect of the *Rimmer* decision.

1983 forum is now the only one available for the assertion of the particular constitution claim. *Prosise, supra* at 1142.

A petition for rehearing en banc was made which argued that the panel's decision overlooked material facts and law, and that a conflict had been created possibly within the Fourth Circuit and definitely between the Tenth and Fourth Circuits.

On March 19th, the panel denied the petition, and by an evenly divided court the petition for rehearing en banc was also denied. A poll was taken and Judges Russell, Widener, Hall, Murnaghan and Chapman would have granted the rehearing. On March 29, 1982 and again on April 28, 1982, the Fourth Circuit entered an order which stayed the mandate of the circuit court for thirty days, pending application of the officers in the Supreme Court of the United States for a writ of certiorari to the circuit court.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. SUMMARY

Even though this Court and the Virginia Supreme Court have established the principle that a guilty plea essentially waives the right to later seek one's freedom based on an alleged fourth

amendment violation, the result of the circuit court's *Prosise* decision is that the same person can nonetheless seek money damages under § 1983. Although *Prosise* had a "full and fair opportunity" to litigate the search and seizure in state court, he voluntarily chose to forego it when he entered into a plea agreement. This waiver must be judicially enforced to avoid attacks on otherwise final state criminal convictions. To hold otherwise, as the circuit court did, will allow a state criminal defendant to plead guilty under favorable terms and conditions and to forum shop by then adjourning to a federal court to raise constitutional claims.

Although the Fourth Circuit established in another recent decision that it will apply waiver or preclusion to unlitigated fourth amendment claims where a state criminal trial took place, it has arbitrarily denied similar effect when a guilty plea is present. *Cramer v. Crutchfield*, 648 F.2d 943 (1981) (per curiam). The Fourth Circuit decision in *Prosise* is also in direct conflict with that of the Tenth Circuit in the same matter. *Metros v. United States District Court*, 441 F.2d 313 (1971). The reasoning of *Prosise* decision also conflicts with the principles underlying decisions by the First and Ninth Circuit, for example, in related cases involving unlitigated legal claims and guilty pleas.

The *Prosise* decision is directly at odds with the principles established by this Court in *Tollett v. Henderson*, 441 U.S. 258 (1973) (plea of guilty waives all antecedent constitutional objections), and *Stone v. Powell*, 428 U.S. 465 (1976) (no right to litigate fourth amendment issue in federal court).

The 1983 action should be precluded by principles of collateral estoppel and waiver. For all of these reasons, the petition for writ of certiorari should be granted and the decision reversed.

II. THE DECISION OF THE FOURTH CIRCUIT WILL ENCOURAGE COUNTLESS STATE PRISONERS TO LITIGATE CLAIMS OF UNLAWFUL SEARCH AND SEIZURE AND TO CHALLENGE THEIR STATE COURT CONVICTIONS THROUGH § 1983 ACTIONS EVEN THOUGH THE SEARCH WHICH PRODUCED THE EVIDENCE WAS THE VERY BASIS FOR THEIR CONVICTION.

The Fourth Circuit's primary reason for its "flat-rule of non-preclusion" in § 1983 actions of issues which were not actually litigated during guilty plea hearings in state court, was that after *Stone v. Powell, supra*, the "§ 1983 federal forum is the only one available for assertion of this particular constitutional claim." *Prosise, supra* at 1142. Although the circuit court recognized that the decision of *Allen v. McCurry*, 449 U.S. 90, 105 (1980), rejected this reason as a sufficient basis

for a "blanket rejection of collateral estoppel in § 1983 actions involving fourth amendment claims," the circuit court found it nonetheless a legitimate reason "well within conventional doctrine." *Prosise, supra* at 1142. As discussed further below, there is no basis for saying that there is a greater need to have federal review of fourth amendment claims arising in state courts in guilty plea cases than when such claims arise during a state court trial.

This Court is fully aware of the rising amount of § 1983 litigation in the federal courts, and the officers will not dwell on this point. The officers respectfully suggest that this litigation will unnecessarily increase if prisoners and other convicted persons are able to seek damages for fourth amendment claims even when they have pleaded guilty, and in particular even when the evidence produced by the search in issue in the later 1983 action was essential to the conviction.

There are strong public policy interests which require that Prosise's § 1983 action be precluded. First, by holding that waiver or estoppel precludes Prosise's 1983 action, this Court would prevent the creation of a new method by which defendants can indirectly attack the

validity of guilty pleas in state courts.[4] There should be finality of judgment, cessation of litigation and a respect for the state court's ability to resolve constitutional issues. To accomplish this, the guilty plea should be given full force and effect. To hold otherwise will disrupt the comity between state and federal governments.[5]

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[4]Although a person who has pleaded guilty cannot obtain his freedom in a habeas corpus proceeding by raising a search and seizure that resulted in his conviction, he will be able to seek money damages from the officers involved. The quantum of damage should not include compensation for time spent in jail since the incarceration was caused by the commission of the crime. However, it will no doubt be argued that people like Mr. Prosise should be able to seek compensation for time spent in jail since the fruits of the search in question in effect put them there. This Court should not permit convicted persons to recover damages for their incarceration under these circumstances.

[5]It is important to note that the *Prosise* court did consider the impact of 28 U.S.C. § 1738. However, the circuit court concluded that Virginia's law on the question was uncertain and not authoritatively addressed by the Virginia courts. *Prosise, supra* at 1138-39. Although the *Prosise* court also concluded that "waiver" was not applicable to the issue, Virginia law is clear that a guilty plea in a criminal case waives the right to contest all but jurisdictional issues. See *Kilbert v. Commonwealth*, 216 Va. 660, 664, 222 S.E.2d 790, 793 (1976). Moreover, in *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (discussed further in the text below), the Fourth Circuit held that under waiver principles the failure to raise a fourth amendment issue in a state court trial

(footnote continued)

An equally important consideration is that a defendant who pleads guilty should not be entitled to greater federal protection than the criminal defendant who fully and fairly litigates constitutional issues in the state court system. As this Court said in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975):

> "A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. *McMann v. Richardson, supra*, at 768, 25 L.Ed.2d 763. Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby

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(footnote continues)

waived the right to litigate the issue in a § 1983 action in federal court. Presumably the same considerations of § 1738 were at work in *Crammer* as are present in *Prosise*.

Even if Virginia did refuse preclusion or waiver, the officers submit that the principles embodied in § 1738 are not offended if the federal courts chose to give greater effect in a 1983 action to a guilty plea upon an unlitigated fourth amendment issue than Virginia would. But see *Prosise, supra* at 1138, fn. 4.

obtained." *Lefkowitz v. Newsome, supra,* 420 U.S. at 289.

The criminal defendant who deliberately refuses to follow the orderly procedure for litigating constitutional claims in order to accept the benefits of a guilty plea should not be entitled to the added benefit of unencumbered access to a federal forum.[6] To reward those defendants who plead guilty would create at least a marginal disincentive to the assertion, and full and fair litigation, of all constitutional claims in the state system.

III. THE PANEL FAILED TO CONSIDER THE EXPRESS FINDING BY THE STATE COURT THAT THE SEARCH AND SEIZURE WAS THE BASIS OF THE CONVICTION AND IT GAVE PRIMARY IMPORTANCE TO THE LACK OF A FEDERAL FORUM FOR THE 1983 CLAIM.

The lengthy testimony about the search and seizure and the express finding by the state trial court that the facts revealed by the search and seizure formed the basis of the finding of guilt are the single most important facts in the case at bar.

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[6]Petitioners are aware of the case of *Jordan v. United States* (and certain state defendants), Civil No. 8-750 PNX WPC now pending the United States District Court for Arizona where the 1983 plaintiffs are attempting to pursue fourth amendment claims after pleading guilty in state court.

These facts are not mentioned in the Fourth Circuit's opinion. Rather than restrict its decision to cases such as the instant one, where the state court record makes it abundantly clear which issues were and were not necessarily decided by the guilty plea, the panel lumps all guilty pleas together.

It is difficult to understand how the Fourth Circuit reached its conclusion that in guilty plea cases it is likely that one could not determine fairly and expeditiously whether a criminal defendant had adequate "incentive" to make a suppression motion. For example, the Fourth Circuit admits in the preceding sentence that "the question could always be resolved in the usual processes, many times fairly and occasionally even rather easily...." *Prosise, supra* at 1141-42.

Prosise had every reason to contest the search, and he chose not to do so; at stake was up to forty years imprisonment. See Va. Code Ann. § 18.2-268. There is no doubt but that Prosise's conviction for manufacturing PCP could not have been obtained without the chemicals, devices, receipts of purchases of chemicals, and experts' analyses of this seized evidence in this case.

The Fourth Circuit assumes, without any basis, that in most all guilty plea situations there

is likely to be some incentive *not* to make a supression motion or that some injustice occurred in the state court. Underlying the Fourth Circuit's decision in *Prosise* is an implicit distrust of the state court system. This distrust is evident at page 1142 of its opinion where the court states that the "more important" reason for adopting a general rule of non-preclusion is that the "§ 1983 federal forum is the only one available for assertion of this particular claim." *Prosise, supra* at 1142. In essence, the circuit court has ignored *Stone v. Powell, supra,* and *Allen v. McCurry, supra.*

In *Stone v. Powell,* the Court held that fourth amendment claims which were capable of being fully and fairly litigated in state court could not be reasserted in federal *habeas corpus* proceedings. Some courts construed *Stone v. Powell* to make collateral estoppel inapplicable to § 1983 actions involving fourth amendment claims on a general belief that there must be at least one unencumbered right to litigate such an issue in a federal court. See *McCurry v. Allen,* 606 F.2d 795 (8th Cir. 1979).

But this reasoning was flatly rejected by the Court in *Allen v. McCurry, supra.* The Court in *McCurry* said that preclusion cannot be denied a state court judgment out of a distrust of the ability of state courts to correctly decide consti-

tutional issues. Section 1983 is now the only hope of pursuing this particular claim because Prosise voluntarily chose not to assert the claim in the state court. As the *McCurry* Court said, there is no principle whereby a person has a universal right to litigate a constitutional claim in federal court, and the error of the panel's opinion is that it seeks to create such a right. *McCurry* at 105. Moreover, there is nothing in the legislative history of § 1983 which indicates that Congress intended to deny binding effect to a state court judgment when the parties had a full and fair opportunity to be heard. *McMurry* at 104.

A. PROSISE'S GUILTY PLEA IN STATE COURT WAS A WAIVER OF THE RIGHT TO ASSERT A CONSTITUTIONAL VIOLATION IN A SUBSEQUENT 1983 ACTION.

It is a well settled principle of federal law that a criminal defendant who pleads guilty waives the right to raise antecedent constitutional objections in subsequent proceedings. *Tollett v. Henderson,* 411 U.S. 258 (1973). This is also the rule in Virginia. *Kilbert v. Commonwealth,* 216 Va. 660, 664, 222 S.E.2d 943 (1976). As this Court stated in *Tollett:*

> "We thus reaffirm the principle recognized in the *Bradey* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the

> criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea...." 411 U.S. at 267.

The issue in *Prosise* is whether this principle of waiver should apply to a fourth amendment claim which could not be brought in a habeas petition is brought in a § 1983 action.

The district court approached the *Prosise* case in this manner. It noted that under *Menna v. New York,* 423 U.S. 61 (1975) (per curiam), a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." App. at p. 43a. The district court reasoned that great significance must attach to a criminal defendant's decision to plead guilty, and stated:

> "If a defendant who pleads guilty is foreclosed from obtaining his freedom

> because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate th[illegible] antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*. The Court thus concludes that plaintiff's fourth amendment claim cannot be maintained in this § 1983 action under the reasoning undergirding the *Tollett* decision." App. at p. 44a.

The Fourth Circuit in *Prosise* rejected the application of this waiver principle, and said that it applies "only to subsequent habeas corpus proceedings challenging the criminal conviction."

The rejection of a waiver principle by the Fourth Circuit in *Prosise* cannot be reconciled with that same court's analysis and holding in *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (per curiam). Cramer filed a Section 1983 action for damages and claimed that a police officer that arrested him for illegally having a radar device had violated Cramer's constitutional rights when the officer searched the cab of Cramer's truck and seized the radar device. Cramer was tried and convicted in state general district court of equipping his vehicle with a radar device in vio-

lation of Va. Code § 46.1-198.1. Cramer did not assert in his trial that his fourth amendment rights had been violated. The federal district court in *Cramer* dismissed Cramer's 1983 claim of an unconstitutional search and seizure.

The Fourth Circuit affirmed the dismissal and said:

> "But Cramer did not object to the evidence derived from the search or move to suppress it at his trial in the Prince George County District Court. *He therefore waived any challenge to the constitutionality of the search.*" *Cramer, supra,* at 945. Emphasis added.

This same reasoning applies to *Prosise* like the seizure of the radar device in *Cramer,* the state court record in *Prosise* also showed that the search and seizure of the chemicals, devices, and receipts of drug purchases were essential to Prosise's conviction. Despite this similarity of facts in *Cramer* and *Prosise,* the *Prosise* panel inexplicably states:

> "In *Cramer* it was manifest from the record that the evidence used to convict in the state criminal prosecution was that obtained by the search and seizure which formed the basis for the

> Section 1983 action. This made equally manifest the Section 1983 plaintiff's 'adequate incentive' to seek its suppression in the state action. *It is precisely because the guilty plea obscures what was manifest in Cramer that we hold here against preclusion.*" Fn. 15 at 1142. Emphasis added.

But even a casual examination of the record in *Prosise* shows that the search was essential to Prosise's plea and that he had "adequate incentive." This ability of a court to determine the impact of a particular constitutional issue on a conviction and hence the adequacy of the incentive to litigate, is not substantially different in trials than it would be in guilty pleas. The point of distinction advanced by the Fourth Circuit is without any basis.

B. PROSISE'S § 1983 ACTION IS ALSO PRECLUDED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

The *Prosise* court begins with the observation that *McCurry* forbids the application of any collateral estoppel doctrine except a "conventional one," and assumes that the application of preclusion in a guilty plea case is not conventional. *Prosise, supra* at 1137. But the Court in *McCurry* said only that the issue before them concerned an example of the "conventional doctrine." Rather

than describing what was or was not "conventional" doctrine or what might obtain in other cases, the Court expressed no opinion and certainly does not forbid the application of collateral estoppel to issues involved in guilty plea cases.

Moreover, the use of issue preclusion in guilty plea cases where the search and seizure issue was essential to the state conviction is not "new" nor is it harsher (or more "stringent") than the preclusion that obtains when a trial took place but the issue was not raised. For example, it was used in 1969 in *Palma v. Powell,* 295 F. Supp. 924 (N.D. Ill.) (because evidence essential to conviction, the plaintiff in a Section 1983 action held precluded from relitigating a search and seizure); it was used in 1971 by the Tenth Circuit in *Metros v. United States District Court,* 441 F.2d 313; in 1972, the Seventh Circuit in *Williams v. Liberty* 461 F.2d 325, expressed its approval of *Palma v. Powers;* and this precise rule of preclusion was applied in *Hooper v. Guthrie,* 390 F. Supp. 1327 (W.D. Pa. 1975). In *Ford v. Manion,* 30 Cr.L. Rptr. 2309 (N.D. N.Y. January 6, 1982), the court reached the exact opposite conclusion than did the *Prosise* court after extensive review of *Allen v. McCurry.*

Some courts have applied preclusion to civil actions based on a prior guilty plea where the

issue was an element of the offense. See *Fontneau v. United States,* 654 F.2d 8 (1st Cir. 1981) (taxpayer's plea of guilty to tax evasion in 1968 bars relitigation of issue of fraud in 1968 when taxpayer brought a late suit for refund); *Brazzell v. Adams,* 493 F.2d 489 (5th Cir. 1974).

Guilty pleas have provided the basis for estoppel (or waiver) in other contexts. For example, in *United States v. $31,697.59 Cash,* 665 F.2d 903 (9th Cir. 1982),[7] the court held that defendants who had pleaded guilty to a criminal charge involving filing false reports when bringing monetary instruments into the county were collaterally estopped from trying to stop the forfeiture of the instruments on the grounds their pleas were involuntary under Fed.R.Crim.P. 11(f). The court reasoned that a claimant who "by-passes opportunities to raise a claim in one forum should not be able to raise it in a collateral forum without a showing of any special circumstances." *Id.* at 906.

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[7]See also, *Larios-Mendez v. Immigration and Naturalization Service,* 597 F.2d 144 (9th Cir. 1979) (person's plea of guilty to a charge of aiding and abetting the illegal entry of aliens would stop the assertion of a Fourth Amendment claim of illegal stop in a subsequent civil deportation proceeding against that same person); and *United States v. One 1973 Dodge Van,* 416 F.Supp. 43, 46 at n. 1 (E.D. Mich. 1976) (car owner's plea of guilty to carrying illegal drugs in his car was a waiver of his right to later contest the constitutionality of his arrest and search of his car in a subsequent forfeiture proceeding).

IV. THERE IS NOW A CONFLICT IN THE CIRCUIT COURTS.

The Fourth Circuit's general rule of non-preclusion in guilty plea cases directly conflicts with the position of the Tenth Circuit. In *Metros v. United States District Court*, 441 F.2d 313 (10th Cir. 1971), the court held that a plaintiff in 1983 action against police officers who has searched his apartment pursuant to a warrant was precluded from alleging that there was no probable cause to support the warrant. The plaintiff had pleaded guilty in state court, and it was held that the subsequent 1983 action on the fourth amendment claims were barred under the doctrine of issue preclusion as the court noted that a "guilty plea is conclusive as to all but jurisdictional issues." *Id.* at 317.

The Fifth Circuit has reached the issue insofar as the essential facts of the crime are concerned. *Brazzell v. Adams, supra.* In *Brazzell v. Adams, supra,* a § 1983 action claiming illegal entrapment in an earlier state criminal case was held to be barred. *Brazzell,* at 490.

Similarly, as the district court said in its opinion in the instant case, "[t]he plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful." App. at 41a. The reason for the circuit court's flat-rule

of non-preclusion in guilty plea cases involving potential but unlitigated claims and its recognition of preclusion where essential elements of the crime are admitted, is that there is evidence of "incentive" to litigate only in the latter situation. *Prosise, supra* at 1140-41. But as appears in the state court record, there is ample evidence of Prosise's incentive to litigate "to the hilt." See *Prosise,* at 1141.

Thus the *Prosise* decision not only has created a direct conflict with the Tenth Circuit's decision in the *Metros, supra,* case but *Prosise* also conflicts with the approach of the Fifth Circuit in *Brazzell, supra,* and with the principles relied upon by the Ninth Circuit in *United States v. $31,697.-59 Cash, supra,* and those relied upon by the First Circuit in *Fontneau v. United States, supra.* The Fourth Circuit should have recognized that the federal court hearing the 1983 action would be able to examine the state court record and determine the adequacy of the incentive to litigate for purposes of collateral estoppel. But in any event, the Fourth Circuit should have found that the plea of guilty was a waiver of the search and seizure claim.

CONCLUSION

The *Prosise* Court has lost sight of the real situation this case presents. There is nothing

inherently unfair about attaching great significance to a guilty plea in a serious offense like Prosise's. When the record in the state court clearly shows that the search in issue in the 1983 case provided the very basis for the conviction, it is plainly wrong to allow the convicted person to litigate that search. There is no sufficient reason for permitting damage claims when those same persons are foreclosed from obtaining their freedom through habeas corpus.

The circuits are now in conflict on this very important issue, and significant judicial resources will be expended unnecessarily if the Fourth Circuit's decision is not reviewed. The effect of the *Prosise* court's opinion will be to severely undermine state court criminal convictions, and to unnecessarily increase burden of the federal courts. For these reasons, this Court should issue a writ of certiorari to the Fourth Circuit Court of Appeals.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed April 28, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer; and
GARBER, Officer,

Appellees.

O R D E R

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed for an additional 30 days to and including, May 28, 1982, pending application of the appellees in the

Supreme Court of the United States for a writ of certiorari to this court.

For the Court - by Direction.

/s/ WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed March 29, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer; and
GARBER, Officer,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of

certiorari to this court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court - by Direction.

/s/ WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed March 19, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant; et al,

Appellees.

ORDER

The appellees' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is denied by an evenly divided court.

Entered at the direction of Judge Phillips for a panel consisting of Judge Winter, Judge Butzner. Judge Russell, Judge Widener, Judge Hall, Judge Murnaghan and Judge Chapman would have granted rehearing en banc.

For the Court

/s/ WILLIAM K. SLATE, II
CLERK

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

December 30, 1981

TO: Norman A. Townsend, Esq.
Sebastian K. D. Graber, Esq.
David R. Lasso, Esq.
Charles G. Flinn, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 79-6310 this date.

The Court's opinion is enclosed.

* * *

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer;
and GARBER, Officer,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria.
Albert V. Bryan, Jr., District Judge.

Argued June 2, 1981 Decided December 30, 1981

Before WINTER, BUTZNER,
and PHILLIPS, Circuit Judges.

Norman A. Townsend (Sebastian K. D. Graber, Graber, Stetler and Townsend on brief) for Appellant; David R. Lasso, Assistant County Attorney (Jerry K. Emrich, Arlington County Attorney on brief) for Appellees.

PHILLIPS, Circuit Judge:

Prosise appeals the district court's grant of summary judgment dismissing his claims under 42 U.S.C. § 1983 that Arlington County, Virginia police officers violated his constitutional rights by using excessive force in arresting him and by conducting a search and seizure in violation of the fourth and fourteenth amendments. The district court held that the officers' use of force was reasonable and not excessive under the circumstances and that the search and seizure claim was precluded by Prosise's guilty plea in the related state court criminal prosecution. We affirm the district court's dismissal of the excessive force claim, but we reverse and remand the search and seizure claim for further proceedings because we do not think the state conviction based on a guilty plea should preclude litigation of that claim.

I

In September 1977, the defendants, County Police Officers Haring, Trumble, Beuchert and Garber, answered a radio call about a domestic disturbance. Arriving at the scene, the officers saw Prosise and a woman, Katherine Denny, at the window of the apartment. Both Prosise and Denny yelled to the officers that the other had a gun, and Prosise held his arm out of the window showing a wound where Denny had stabbed him.

Prosise called to the officers that he would let them in if they came up.

The officers went up the stairwell and stood outside the door on a landing. They announced themselves and attempted unsuccessfully to open the door. After hearing two gunshots, they drew their guns and tried to kick the door in. At that moment, Prosise - who is six feet four inches tall - opened the door and greeted the officers with two handguns in his left hand. The officers ordered him to back away and drop his weapons. He refused to do so, even when one officer pointed a gun at his chest and repeated the order. Fearing that he might use his weapon, the officers seized him and sought to disarm him by force.

A scuffle ensued, during which the officers subdued and disarmed Prosise. He was handcuffed and taken into custody and was later treated at a local hospital for abrasions. Prosise claims that the officers struck him in the cheek with a pistol during the scuffle, while Trumble remembers only that he struck him with his fist in order to disarm him.

After Prosise was taken away, Denny told the officers that Prosise was manufacturing drugs and that he kept them in a closet. She led them to a closet and showed them a baggie she said

contained "PCP" (phencyclidine or "angel dust") and the substances and devices which she said Prosise used in making PCP.

The officers did not seize any of the articles but called Narcotics Detective Allen to the scene. This practice is standard when drugs of this nature are involved because the chemicals are often volatile and can be dangerous. Detective Allen noticed a smell of ether, saw the chemicals in the closet and concluded that these chemicals were probably being used to manufacture PCP. Allen left the two remaining officers to secure the area and went to the magistrate for a search warrant. Allen returned with a search warrant, and the officers searched the apartment, seizing the chemicals and drug paraphernalia.

Prosise was later charged in a state prosecution with a count of manufacturing phencyclidine and a count of possession of phencyclidine. He executed a plea agreement wherein he was to plead guilty to the count of manufacturing in return for a *nolle prosequi* of the count of possession. The Arlington Circuit Court accepted his guilty plea. At the hearing, Detective Allen testified about the search of Prosise's apartment, explaining that a chemist had identified the chemicals seized as being PCP in various stages of manufacture.

At sentencing some weeks later, Prosise attempted to withdraw his guilty plea. The court denied Prosise's motion to withdraw the plea and imposed a sentence of fine and imprisonment. The Virginia Supreme Court denied his petition for writ of error challenging the voluntariness of his plea and the refusal of the trial court to permit the withdrawal of the plea. *Prosise v. Commonwealth*, Record No. 78-1479 (July 17, 1979).

Prosise then commenced this action in the United States District Court for the Eastern District of Virginia alleging, under 42 U.S.C. § 1983, a denial of his constitutional rights under color of state law. He claimed, among other things, that the officers had used excessive force during this arrest and had engaged in an illegal search and seizure. The district court dismissed all but these two claims, and the defendants moved for summary judgment as to them.

The district court granted summary judgment for the defendants on the excessive force claim, based on the uncontradicted sworn statements of the officers explaining the circumstances of their use of force, and on the fourth amendment claim, on the basis that recovery was precluded by Prosise's guilty plea. This appeal followed.

Prosise contends here that his verified complaint sufficiently stated a cause of action under § 1983 for the use of excessive force, and that it was uncontradicted by the defendants' affidavits supporting their motion. The defendants did not deny his allegation that he was "pistol-whipped." At the very least, then, he is entitled to a plenary evidentiary hearing. He further contends that, on the authority of *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), this court should enter summary judgment in his favor.

Second, he argues that he is not precluded by his guilty plea from maintaining a § 1983 action against the arresting officers for illegal search and seizure. Under the Supreme Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), holding that the conventional doctrines of collateral estoppel are to be applied to § 1983 claims, he contends that his fourth amendment claim is not precluded because it was not actually litigated in the state criminal action.

II

We consider first Prosise's claim that unconstitutionally excessive force was used in his arrest. Although we agree with Prosise that on the summary judgment record there is a factual dispute as to the exact details of the arrest encounter, we agree with the district court that

even on the facts as Prosise alleges them the force used to subdue him was not under the circumstances constitutionally excessive.

The rule applied in *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), does not help Prosise. The encounter here alleged was, on Prosise's own account, one quite different from that in *King*. Prosise, a very large man, held two handguns and refused to drop them on command. There is no suggestion that the officers applied any force subsequent to disarming and subduing him. This situation is simply unlike that in *King* where force was applied to one safely in custody "maliciously and sadistically for the very purpose of causing harm," *id.* at 73 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)), but is manifestly one where the officers acted in a reasonable, hence good faith, effort to subdue an armed man who was plainly resisting lawful authority and posing a real threat of harm. We therefore agree with the district court that on the facts as stated in Prosise's verified complaint the defendants were entitled to summary judgment on this claim.

III

The district court held that Prosise was absolutely precluded in respect of his fourth amendment claim on two bases: (1) that, though the question of the search and seizure's legality

had not been "fully litigated" in the state criminal action, *cf. Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977) (actual litigation results in preclusion), the "plea of guilty estops him" because it "necessarily implied that the search...was lawful." *Prosise v. Haring, et al.*, C.A. No. 79-105-AM, slip op. at 5, 6 (E.D. Va. April 17, 1979); and (2) that, in any event, under *Tollett v. Henderson*, 411 U.S. 258 (1973), and its progeny, the guilty plea had the effect of waiving the antecedent constitutional objection since that objection was neither related to factual guilt or innocence nor to the right of the defendant not to be tried. *Prosise*, slip op. at 6, 7.

A

On the waiver basis for decision, we think that the specific waiver principle announced in *Tollett* properly applies only to subsequent federal habeas corpus proceedings challenging the criminal conviction. As analyzed in *Tollett*, this principle rests upon the perception that the guilty plea constitutes "a break in the chain of events" in the criminal prosecution, *Tollett*, 411 U.S. at 267, so that any subsequent habeas corpus inquiry is necessarily focused on the constitutional validity of the plea and "not the existence as such of an antecedent constitutional infirmity." *Id.* at 266. This is inapposite to the question whether a § 1983

claim based upon the "antecedent constitutional infirmity" may later be prosecuted free of any preclusive effect. In consequence, we think that whether there should be any preclusive effect is to be determined on the basis of other principles, specifically, of collateral estoppel and the full faith and credit statute, 28 U.S.C. § 1738. To those we now turn.

B

For possible guidance on these questions we withheld decision following original hearing of this appeal and reheard it on supplemental briefs following the Supreme Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), where the general problem of preclusion by collateral estoppel in § 1983 actions was presented. The decision in that case was, however, a narrowly confined one that is not of itself dispositive here. It held only that even though *Stone v. Powell*, 428 U.S. 465 (1976), may have deprived a state prisoner of a federal habeas forum to pursue a fourth amendment claim, the conventional doctrine of collateral estoppel and the full faith and credit command of 28 U.S.C. § 1738 might operate by issue preclusion to deprive him as well of the alternative § 1983 forum for pursuing it. *McCurry*, 449 U.S. at 103-05.

Specifically not decided by the *McCurry* Court was the question "*how* the body of collateral-estoppel doctrine or 28 U.S.C. § 1738 should apply," *id.* at 105 n.25 (emphasis in original), including the question "whether any exceptions or qualifications within the bounds of [the] doctrine might ultimately defeat a collateral-estoppel defense," *id.* at 95 n.7, in a subsequent § 1983 action. But the Court was at special pains to point out that the collateral estoppel doctrine to be applied is the "conventional doctrine" rather than any "new, more stringent" one, and, most specifically, that it is not one which "turns on the single factor of whether the State gave the federal claimant a full and fair opportunity to litigate [the] federal question." *McCurry*, 449 U.S. at 95 n.7.[1]

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[1]This last point, that collateral estoppel in § 1983 actions cannot be based solely upon the fact that a full and fair opportunity to litigate the federal issue was provided in state court, was made in specific response to the dissent's suggestion that this was the import of the majority opinion. *Allen v. McCurry*, 449 U.S. at 113 & n.12 (Blackmun, J., dissenting).

We understand the court's position to be that a state's failure to provide full and fair opportunity to litigate the issue might, within the conventional doctrine, *avoid* an otherwise appropriate application of collateral estoppel, *see Re-*

(footnote continued)

McCurry essentially, therefore, merely confirmed the general principle that had already been applied in earlier decisions of this court that under appropriate circumstances collateral estoppel might, within traditional bounds, apply to defeat § 1983 constitutional claims because the dispositive issues had earlier been decided adversely to the federal plaintiffs in state criminal actions. *See Wiggins v. Murphy*, 576 F.2d 572 (4th Cir. 1978) (per curiam) (attempt by § 1983 action to have state convictions expunged on federal grounds); *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977) (sixth amendment claim). To this general confirmation *McCurry* added only the point - on which we had expressed reservation in *Rimmer*, 567 F.2d at 276 - that this preclusion principle is not displaced with respect

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(footnote continues)
Statement (Second) of Judgments § 68.1 (1980), rather than the obverse, that provision of the full and fair opportunity, standing alone, gives rise to collateral estoppel. As the *McCurry* dissent points out, *Allen v. McCurry*, 449 U.S. at 113 & n.12, the effect of the latter would be to equate § 1983 collateral estoppel (issue preclusion) with bar (claim preclusion) under which the § 1983 claimant would be precluded from litigating any issue that *might* have been raised in the state criminal action. The majority flatly disclaimed this as its holding and we are of course bound by that perception.

to fourth amendment claims by the nonavailability under *Stone v. Powell* of an alternative federal habeas forum. And it emphasized, to an extent our decisions to date perhaps have not, the primary importance of the command embodied in 28 U.S.C. § 1738 to seek in the law of the judgment state the precise rule of conclusiveness to be applied to its criminal judgment.

Not therefore decided by the *McCurry* Court - indeed not specifically before it on the facts of that case[2] - was the narrow question which we address and to which we expressly confine decision here. That question is whether, and if so under what circumstances, a state court judgment entered on a guilty plea may be preclusive in a federal § 1983 action of an issue which in the state action was not actually litigated and could only have been litigated in relation to the exclusion of evidence on fourth amendment grounds.

We note preliminarily that this is a different question than the more inclusive one whether a guilty plea judgment may be preclusive as to any § 1983 issue, and the related one whether it may be preclusive as to an issue, that was an essential

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[2]In *McCurry* the state conviction was not based on a guilty plea but resulted from a trial following pre-trial denial of a motion to suppress evidence on fourth amendment grounds.

element of the state crime charged. To answer the narrow question we address is not necessarily to answer either of the others, and we expressly reserve decision on them.

It is also obviously a different question from those already authoritatively answered by our decisions in *Wiggins v. Murphy*, 576 F.2d 572, *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273, and, most recently, *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (per curiam), in each of which we gave issue preclusive effect in § 1983 actions to state judgments of conviction based upon adjudications of guilt rather than guilty pleas.[3] We therefore address it as a question of first impression on which our earlier decisions applying collateral estoppel in § 1983 cases are not dispositive.

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[3]In both *Rimmer* and *Wiggins* the specific constitutional violations charged in the § 1983 actions had been actually litigated in the state criminal trials as defenses or objections necessarily determined adversely to the state defendants. In *Cramer* the fundamental constitutional violation charged in the § 1983 action - an illegal search and seizure resulting in an alleged malicious prosecution - was not actually litigated at any stage, but as in both *Rimmer* and *Wiggins* the state judgment resulted from conviction after a trial. In *Cramer* we spoke of the defendant's failure to raise the constitutional objection at any stage as a "waive[r]." 648 F.2d at 945. *See* note 15 *infra*.

(1)

Under the command of 28 U.S.C. § 1738, *see McCurry*, 449 U.S. at 97-98 & n.11, we look first to the law of Virginia to determine whether, and to what extent, that state would give preclusive effect to the criminal judgment here in issue.[4]

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[4]The exact operation of § 1738 and its relationship to general policies of res judicata in the § 1983 context is not wholly clear. The questions have only emerged as potentially important ones with the relatively recent burgeoning of § 1983 litigation. *See generally Restatement (Second) of Judgments* § 134, Comment *d* (1980). Prior to the decision in *Allen v. McCurry*, there was a divergence of views about the relationship between § 1983 and § 1738 among both courts and commentators. *See generally* Comment, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. Mich. J. of L. Ref. 465, 486-88 (1981). It may well persist after *McCurry*. In that decision the Court did not directly address the question of the relationship between the two, but while apparently assuming their congruence, seemed also to suggest primacy for the command embodied in § 1738. *See McCurry*, 449 U.S. at 94-96. It is generally assumed that the command is to give to the state judgment the same effect - no more and no less - that the state courts would give it. *See Restatement (Second) of Judgments* § 134, Comment *g* (1980). In combination these principles of primacy for the state rule and exact enforcement of the state judgment according to its dictate would create a problem if the state rule were found to be at flat odds with "conventional doctrine." We do not face that problem here, since we find both the state rule and general principles of collateral estoppel to be sufficiently uncertain in their application to the particular

(footnote continued)

The Virginia decisions to which we have been directed do not yield a definitive answer. None has addressed the precise, narrow question of the preclusive effect of a guilty plea judgment upon issues that in the state criminal prosecution could only have been relevant to determining the admissibility of evidence. On broader questions of the preclusive effect of criminal judgments, the state's highest court stated in 1958 that the general rule in Virginia remained that expressed in 1916 in *Supervisors of Tazewell County v. Norfolk & Western Railway Co.*, 119 Va. 763, 91 S.E. 124 (1916) that

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Aetna Casualty & Surety Co. v. Czoka, 200 Va. 385, 105 S.E.2d 869, 872 (1958). In *Czoka*, a

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(footnote continues)
kind of issue here involved that no choice is forced. In consequence, we can reserve that thorny question for another day.

person in privity with the civil defendant had pled guilty to an offense that had as an essential element a dispositive issue in the civil action before the court. The plaintiff sought preclusive effect as to this issue from the criminal conviction. Applying the general rule from *Tazewell County*, the court refused any preclusive effect. The next year this general rule was again recognized, in dictum, as applying to criminal judgments, in *Smith v. New Dixie Lines, Inc.*, 201 Va. 466, 111 S.E.2d 434 (1959) (dictum: party sought to be precluded not party to criminal action nor otherwise bound by criminal judgment). So far as our research discloses, these two decisions remain the most recent pronouncements and applications of Virginia's general rule relating to the preclusive effect of *criminal* judgments.

To this general rule against preclusion, the Virginia courts have apparently applied only one narrow exception. A plaintiff, previously convicted of arson, has been held precluded by the conviction from recovering the proceeds of a fire insurance policy covering the building he was found guilty of burning. *Eagle, Star & British Dominions Insurance Co. v. Heller* 149 Va. 82, 89, 140 S.E. 314, 316 (1927). Subsequent decisions, adhering to the general rule, have simply recognized *Heller* as an exception to it. *See Smith v.*

New Dixie Lines, Inc., 201 Va. 466, 472-73, 111 S.E.2d 434, 438-39 (1959); *Aetna Casualty & Surety Co. v. Czoka*, 200 Va. 385, 389, 105 S.E.2d 869, 872 (1958).

These Virginia decisions seem, therefore, to establish that, except in the narrow context of the arson conviction in *Heller*, criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect in subsequent civil litigation.[5] Virginia's narrow rule of preclusion as announced in *Heller*, where conviction was by adjudicated guilt and where the issues precluded were esential elements of the crime charged, does not by necessary implication apply to the preclusive effect of guilty plea judgments upon other issues than those constituting essential elements of the crime. As indicated, that precise question has not, so far as our research discloses, been authoritatively addressed by the Virginia courts.

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[5]Virginia's general rule against preclusion by criminal judgments is rested upon the mutuality requirement, *see Aetna Casualty & Surety Co. v. Czoka*, 200 Va. 385, 105 S.E.2d 868, 872 (1958), a requirement that the Supreme Court of Virginia has recently declined to abandon, at least in cases of attempted "offensive" use. *Norfolk & Western Railway Co. v. Bailey's Lumber Co.*, 221 Va. 638, 272 S.E.2d 217 (1980) (citing *Aetna Casualty & Surety Co. v. Czoka* in support, but recognizing the *Heller* exception where defensive use was involved).

(2)

When we look to general principles of collateral estoppel, either as a guide to Virginia's likely view were the precise question presented to its highest court or as an independent source for the proper application of collateral estoppel doctrine to our issue,[6] the answer is again not definitively given.

It cannot be found with certainty in the recent *Restatement (Second) of Judgments* (1980), taking that as perhaps the best possible source for a responsible statement of "conventional doctrine" in this realm. This important secondary authority suggests that as a general proposition criminal judgments based upon guilty pleas can have no collateral estoppel effect as to *any* issues, because by definition none has been "actually litigated," *Restatement (Second) of Judgments* § 133, Comment *b* (1980), a fundamental predicate for issue preclusion in the Restatement's formulation, *see id.* § 68, Comment *e*. This general proposition is immediately hedged, however, by the concession that "[a] defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts *representing the elements of the*

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[6]See note 4 *supra*.

offense...not [as] a matter of issue preclusion...but [as] a matter of the law of evidence...," *Id.* § 133 Comment *b* [emphasis added].

This concession is forced by a significant number of decisions,[7] including several by other

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[7]These decisions have recently been collected in Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 Iowa L. Rev. 281 & nn. 122-25 (1980); Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 Cornell L. Rev. 464, 478-83 (1981) [hereinafter cited as *Modest Dissent*] in the course of that respected commentator's challenge to the *Second Restatement's* general position that an essential predicate for collateral estoppel is that the issues shall have been "actually litigated." The existence of these decisions is of course recognized in the *Second Restatement*, but their results, though conceded to be possibly "correct," are there ascribed to estoppel principles derived from the law of evidence rather than from traditional res judicata doctrine. *Id.* § 133, Comment *b*; Reporter's Note, Comments b and c. Many of the cases, however, clearly reveal an assumption that res judicata/collateral estoppel doctrine is being applied. Freed of any "mutuality" and "actually litigated" requirements, collateral estoppel doctrine would of course clearly apply, and Professor Vestal so explains the cases. *See* Vestal, *Modest Dissent*, *supra*, at 478-83. For our immediate purposes we have to assume that these decisions constitute elements in the body of "conventional" collateral estoppel doctrine to which *McCurry* requires our attention, notwithstanding the indications of a lack of scholarly consensus on the exact shape of that doctrine.

federal courts of appeals,[8] that have rather routinely found estoppel arising from guilty pleas notwithstanding the lack of actual litigation of the critical issues. With only a few exceptions,[9] these decisions finding preclusion in guilty pleas have concerned issues that represented elements of the crime charged. As to such "element-issues" it can with reason be said - and has been said in various ways - that though not actually litigated they have necessarily been judicially admitted by the plea, so that the criminal defendant is estopped to contest them in subsequent civil litigation. *See e.g., Brazzell v. Adams,* 493 F.2d 489, 490 (5th

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[8] *Brazzell v. Adams*, 493 F.2d 489 (5th Cir. 1974) (§ 1983 action); *Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977) (diversity action); *Hernandez-Uribe v. United States,* 515 F.2d 20 (8th Cir. 1975) (criminal action); *Ivers v. United States,* 581 F.2d 1362 (9th Cir. 1978) (federal civil action). All these decisions applied preclusion to issues which represented essential elements of the crime to which a guilty plea had been entered.

[9] *See Metros v. United States District Court for District of Colorado,* 441 F.2d 313 (10th Cir. 1971) (false arrest; illegal search); *Hooper v. Guthrie,* 390 F.Supp. 1327 (W.D. Pa. 1975) (false arrest; false imprisonment); *Palma v. Powers,* 295 F.Supp. 924 (N.D. Ill. 1969) (§ 1983 action for illegal search and seizure) (result criticized in Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems,* 66 Cornell L. Rev. 564, 581-84 (1981) [hereinafter cited as *Revisiting*], in the course of that author's response, as Reporter for the *Second Restatement,* to Professor Vestal's critique).

Cir. 1974); *Hernandez-Uribe v. United States*, 515 F.2d 20, 21 (8th Cir. 1975); *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978). If this then be conventional - or at least plainly emerging - doctrine respecting element-issue preclusion by guilty plea, the question remains whether it should apply as well to non-element issues, specifically, for our purposes, to the potential but unlitigated issue whether specific evidence of the crime should be suppressed on fourth amendment grounds.

(3)

Assuming, without deciding, that a state judgment based on a guilty plea should ordinarily[10] have preclusive effect in a later § 1983 action as to all issues representing essential elements of the crime, we do not think it should have preclusive effect as to potential but not actually litigated issues respecting the exclusion of evidence on fourth amendment grounds. There is a critical distinction, grounded in fundamental policies respecting the proper application of collateral estoppel, between the two types of issues.

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[10]Subject of course to the possible application of various "qualifications and exceptions" that within conventional doctrine may make collateral estoppel inappropriate in a particular case, including most fundamentally a lack of full and fair opportunity to litigate. *See McCurry*, 449 U.S. at 95 & n.7.

It related to the assurance that there was adequate *incentive* in the criminal proceeding fully to litigate the issue sought to be precluded.

Whatever the difference among courts and commentators as to the "actually litigated" requirement for issue preclusion, there has been general agreement - to the point of convention - that among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had not only a full and fair opportunity but an adequate incentive to litigate "to the hilt" the issues in question.[11] *See generally Restatement (Second) of Judgments* § 68.1(e)(iii), Comment (1980). With respect to issues representing the very elements of the crime charged, the adequacy of incentive to contest may be thought manifest in relation to any guilty plea. But it is not necessarily manifest with respect to potential but

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[11]It is possible to analyze the basic point of difference between the *Second Restatement*'s position and that of Professor Vestal on guilty plea preclusions as going as much to how and by whom "adequate incentive" is to be shown as to whether the "actually litigated" requirement has general application in collateral estoppel doctrine. *See Hazard, Revisiting, supra* at 584. But there is no disagreement that adequate incentive is a critical component of collateral estoppel.

unlitigated issues related to the exclusion of evidence on fourth amendment grounds.[12] A moment's reflection shows why.

Despite the most egregious violation of fourth amendment rights, it is quite conceivable that a state criminal defendant has no real incentive to seek suppression of the resulting evidence because the state has so sufficient an amount of untainted evidence that making the effort would in the end be futile and possibly even harmful to the defendant's immediate interests. In that situation, while a guilty plea might be thought, despite the lack of actual litigation, to be properly preclusive of element-issues, we think it should not be preclusive of the search and seizure issue. On the other hand, there is always the possibility that in a particular case a guilty plea has been entered when the only available evidence on critical issues was search and seizure evidence. In that situation, there was obviously as

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[12]Lying perhaps between these two types of issues and presenting still different sets of considerations are issues that in the criminal action represented not elements of the crime but of potential absolute affirmative defenses such as entrapment or stop-gap objections that had no evidence exclusion implications. On these we reserve decision, simply noting that each presents incentive-to-litigate problems that may differ in critical respects from those presented by evidence-suppression issues.

much incentive to litigate the suppression issue as any representing essential elements of the crime, and if preclusion is finally to turn on incentive, it should in that situation result as well for the evidentiary as for the element-issue.

This could of course be determined on a case by case basis, with the question whether the one situation or the other was present being addressed in the § 1983 action as one of fact incident to determining the collateral estoppel defense. *Cf. Restatement (Second) of Judgments* § 68, Comment *f* (1980) (extrinsic evidence to determine what issues litigated). Fair resolution of this factual question could be expected, however, frequently to be difficult. Relevant evidence would consist of such state court records of proceedings incident to the guilty plea as might be available and any extrinsic evidence bearing upon the scope of the state's evidence and the defendant's knowledge of it at the critical time. It is of course true that however sparse and ambiguous this evidence might be, the incentive question could and would nevertheless finally be resolved in every case, as are many other difficult issues, through the ultimately decisive leverage of proof burdens.[13] But while the question could always in

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[13]That the proper cast of this burden might itself present a difficult problem, *see Hazard,*

(footnote continued)

the end be resolved by the usual processes, many times fairly and occasionally even rather easily, we think that on balance the game is not worth the candle. The question is so likely to be one incapable of fair and expeditious resolution in the run of § 1983 actions that we believe a general rule of non-preclusion should obtain with respect to search and seizure issues in guilty plea cases.

Such a rule, we think, is amply justified by those general policies which emphasize the need for judicial flexibility in accommodating conflicting values of finality, fairness, and public confidence in applications of res judicata. *See generally Restatement (Second) of Judgments*, Ch. 1, Introduction pp. 12-15 (1980); *id.* § 68.1. It is conformable under 28 U.S.C. § 1738 to Virginia decisions respecting the preclusive effect of its criminal judgments.[14] And it is compatible with our own prior decisions respecting the estoppel effect of state criminal judgments in § 1983 actions.[15]

(footnote continues)

Revising, supra at 584. The problem is not of course before us, but its existence may properly be taken into account as an added difficulty in resolving the incentive question on a case by case basis.

14 *See* Part III B (1).

15 *See* cases cited at note 3 *supra*. As there indicated, in all three of the cases, *Wiggins,*

(footnote continued)

The price exacted by such a flat rule of non-preclusion is the opportunity it affords state prisoners who pled guilty in state courts to litigate for the first time in § 1983 actions search and seizure issues that might have been but were

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(footnote continues)

Rimmer, and *Cramer*, in which we have given issue preclusive effect in § 1983 actions to state court judgments of conviction, the judgments were based upon adjudications of guilt after trial. None involved guilty pleas. Additionally, in both *Wiggins* and *Rimmer*, the issues precluded had been "fully litigated" and determined adversely to the § 1983 plaintiff in the state criminal action. This further distinguishes those decisions in a critical respect. In *Cramer*, the precluded issue had not been fully litigated in the state criminal action where it was potentially an evidence suppression issue. *Cramer* is therefore the case in the trilogy most like the instant case in those respects critical to application of collateral estoppel doctrine: there, as here, the issue was not an element-issue, and it was not fully litigated. But it differs in yet another critical respect which justified preclusion there but makes it inappropriate here. In *Cramer*, it was manifest from the record that the evidence used to convict in the state criminal prosecution was that obtained by the search and seizure which formed the basis for the § 1983 action. This made equally manifest the § 1983 plaintiff's "adequate incentive" to seek its suppression in the state action. It is precisely because the guilty plea obscures what was manifest in *Cramer* that we hold here against preclusion.

not raised[16] in state criminal actions. Given the obvious disincentive to forego meritorious suppression motions in the criminal action, *see McCurry*, 449 U.S. at 104 n.23, and the subsequent disincentive (however modest some may consider it) to advance frivolous search and seizure claims in the § 1983 action, we think the price not an exorbitant one in terms of judicial resources and the public interest even if there were no countervailing considerations. And there are of course such considerations. First, there is the avoidance by this means of any necessity to devote effort and resources in the § 1983 action to the resolution of a peripheral factual question of incentive that, as indicated, is likely to be difficult and frequently incapable of fair resolution in that collateral setting.

More important is the fact that since *Stone v. Powell*, 428 U.S. 465 (1976), the § 1983 federal

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[16]Still another variant on the narrow question we decide would be that presented by an unsuccessfully litigated suppression motion followed by a guilty plea. Whether that situation should be thought controlled by our "fully litigated" decisions, or by this one, or be treated as presenting still different collateral estoppel problems, we need not here decide. *See, e.g., Restatement (Second) of Judgments* § 41, Comment *g* (1980) (finality for issue preclusion purposes); *id.* § 68.1(a), Comment *a* (effect of inability to obtain appellate review).

forum is the only one available for assertion of this particular constitutional claim. Though the Supreme Court has specifically rejected this as a sufficient reason for blanket disallowance of collateral estoppel in § 1983 actions involving fourth amendment claims, *McCurry*, 449 U.S. at 102-05, it remains a legitimate reason - well within "conventional doctrine" - for systematically disallowing it in the narrow and concededly marginal circumstance for applying collateral estoppel that is created by guilty pleas. See generally *Restatement (Second) of Judgments* § 88, Comments *b* and *d* § 68.1(e), Comment *g* (1980); *see also Allen v. McCurry*, 449 U.S. at 115 (Blackmum, J., dissenting) (emphasizing different case of search and seizure issues in the two proceedings).

IV

For the reasons given in Part III, we reverse and remand for further proceedings consistent with this opinion that portion of the judgment of the district court which dismissed, on waiver and estoppel grounds, Prosise's search and seizure claim. For reasons given in Part II, that portion of the judgment dismissing Prosise's excessive force claim is affirmed.

AFFIRMED IN PART
REVERSED AND
REMANDED IN
PART

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 79-105-AM

JOHN FRANKLIN PROSISE,

Plaintiff,

v.

LT. GILBERT A. HARING, et al.,

Defendants.

ORDER

The Court has received defendants' answer, motion to dismiss or for summary judgment, memorandum in support of that motion and supporting affidavit of facts. These pleadings respond to plaintiff's allegations that defendants used excessive force during plaintiff's arrest and that the search warrant issued to authorize the search of his apartment was defective, thereby making the search and seizure illegal.

With respect to plaintiff's first claim of excessive force, defendants submit the following: that on September 7, 1977, several of the defendants, who were Arlington County police officers, responded to a call for assistance made by the plaintiff; that upon arrival at plaintiff's apartment

the officers saw plaintiff and his fiance, Katherine Denny, at the window and heard them accuse each other of holding a gun; that upon approaching the door of plaintiff's apartment the officers heard Denny shout that "he has a gun;" that after announcing themselves the officers attempted unsuccessfully to open the door; that the officers then heard two gunshots and promptly drew their weapons; that plaintiff opened the door and stood in the doorway holding a revolver and a pistol; that plaintiff was told to drop his weapons but refused to do so; that the officers then seized plaintiff and attempted to disarm him by force; that a brief scuffle ensued during which defendant Trumble struck plaintiff with his fist to force plaintiff to drop his weapons; and that plaintiff was thereafter disarmed, handcuffed and taken into custody.

These sworn representations entitle defendants to summary judgment on claim (1). Plaintiff's possession of two weapons and refusal to drop them upon request by police officers fully justified the reasonable use of force to disarm plaintiff. The fact that plaintiff was six foot four inches tall and was engaged in a heated argument involving weapons further support the reasonable use of force to ensure the officers' safety. Even accepting as true plaintiff's allegation that Of-

ficer Trumble jabbed him hard with his pistol and threw plaintiff toward a couch, the Court views these acts as reasonable responses to the threat posed by an armed and uncooperative individual. Although plaintiff alleges that Officer Beuchert struck him in the head with a pistol butt with enough force to fracture plaintiff's cheekbone, defendants' affidavit does not indicate that such a blow was struck. The Court concludes that defendants deny that Officer Beuchert delivered such a blow since defendants' sworn affidavit, purporting to recite the events in question, omits any reference to a pistol-whipping. The Court relies on this sworn affidavit in arriving at the conclusion that defendants used reasonable force in subduing plaintiff and therefore are entitled to summary judgment. As indicated below, the award of summary judgment is made conditional for the purpose of affording plaintiff an opportunity to submit an affidavit that contradicts defendants' version of the facts in question, particularly the actions of Officer Beuchert with reference to the alleged pistol-whipping.

In his second claim plaintiff attacks the validity of the search warrant obtained by the defendants to authorize the search of plaintiff's apartment. In his complaint plaintiff stated that the search warrant obtained to seize chemicals and devices used to manufacture phencyclidine

(PCP) contained "false information" that was used to "set up" the plaintiff. In an attempt at explanation plaintiff asserted that the search warrant was directed at chemicals in the living room whereas in reality they were located in the closet; he further contended that the officers who executed the warrant (defendants Allen and Badey) emptied out some of the contents of the chemical bottles in order to create the appearance of use by the plaintiff. He further charges officers Allen and Badey with seizing chemicals that were not authorized to be seized in the warrant and with moving chemicals around so that they would appear in plain view. Finally, plaintiff maintains that Officer Beuchert exceeded the scope of the search warrant by seizing drugs out of a shirt located in the bathroom.

Defendants contend that plaintiff is collaterally estopped from contesting the validity of the search warrant because he pled guilty to a charge that was predicated on the fruits of the search. They also present an alternative argument suggesting that the search warrant was valid and supported by an appropriate affidavit (see defendants' exhibit A) and that the officers did not exceed the scope of the warrant.

The Court is also convinced of the validity of the warrant and subsequent search. Certainly

detective Allen's affidavit, based upon his own observations and the statements of Katherine Denny, were sufficient to make the requisite showing of probable cause. *Berger v. New York*, 388 U.S. 41 (1967); *United States v. Ventresca*, 380 U.S. 102 (1965). Moreover the scope of the search did not exceed the items set forth in the search warrant.[1] *Andresen v. Maryland*, 427 U.S. 463 (1976). But the disposition of plaintiff's fourth amendment claim should not, at this stage, be based upon its merits where, as here, defendants assert that collateral estoppel bars any consideration of the merits in the first instance. In support of this argument defendants refer the Court to the Fourth Circuit's recent decisions in *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977), and *Wiggins v. Murphy*, 576 F.2d 572 (4th Cir. 1978). Those cases, however, do not stand for the proposition suggested by the defendants. In *Rimmer* the court held that the doctrine

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[1]The Court also notes that the search of plaintiff's apartment can in part be upheld as a consent search because Ms. Denny, who also resided at the apartment, led officers to a hall closet containing PCP and apparatus used in its manufacture. Since Ms. Denny possessed "common authority" over the premises, the search can be justified without regard to a warrant. *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Carter*, 569 F.2d 801 (4th Cir. 1977).

of collateral estoppel foreclosed assertion of a state prisoner's claim that identification testimony was unconstitutionally admitted into evidence because the issue was precluded by the standing state conviction. The *Rimmer* court explicity refrained from deciding the availability of a § 1983 cause of action where there is no right of access to a federal habeas forum. The court recognized that such a situation could arise with respect to fourth amendment claims because the Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), normally would foreclose state prisoners from litigating such claims in a federal habeas forum.

The *Rimmer* decision suggests that collateral estoppel applies only to those issues which can be presented a federal habeas forum. *Von Lusch v. C & P Tel. Co.*, 457 F.Supp. 814 (D. Md. 1978). That suggestion is implicit in the *Rimmer* court's observation that "[s]ince it was the general intention of the Civil Rights Act to provide access to a federal forum for the adjudication of federal constitutional rights, the Civil Rights Act itself may present a bar to foreclosure of the issue in those cases [in which federal review is otherwise unavailable]." 567 F.2d at 276. Since a fourth amendment claim normally is not subject to

federal habeas review,[2] plaintiff in this action would be unable to litigate his claim of illegal search and seizure unless he is permitted to do so under § 1983.[3]

This case is complicated, however, by the fact that plaintiff's conviction was secured through a plea of guilty. This additional factor was not present in *Rimmer*, wherein the § 1983 plaintiff had actually litigated at trial his claim that a witness' identification testimony was inadmissible. *See* 567 F.2d at 275. Thus the plaintiff there was collaterally estopped from raising this claim in a § 1983 action because he "fully litigated the question he now tenders in the course of his criminal trial...." *Id.* at 276. In this case there was no criminal trial and the search and seizure question was not "fully litigated" as it was in *Rimmer*. Regardless of whether this distinction removes this case from the purview of *Rimmer*, however, the Court believes that plaintiff's plea of guilty estops him from asserting a fourth amendment claim in a § 1983 suit. The plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful. *See*

2*See Stone v. Powell, supra.*

3*See Christine M. Fore, et al. v. W. G. Newell*, Civil Action No. 78-417-AM, pp. 8-9 n. 3 (E.D. Va. October 10, 1978).

Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974); *Meadows v. Evans*, 550 F.2d 345, 351-53 (5th Cir. 1977) (per curiam) (Tjoflat, Jr., concurring in part and dissenting in part). While the plea did not include an admission of the elements of the crime such as in *Brazzell*, it did admit the facts necessary to subject the plaintiff to criminal liability. Most important, the Supreme Court has held that deprivation of constitutional rights occurring prior to a guilty plea may not be asserted in subsequent proceedings. *Tollett v. Henderson*, 411 U.S. 258 (1973); *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

In *Tollett* the Court held that a state prisoner who tenders a guilty plea may not thereafter assert on federal habeas corpus constitutional claims that relate to events that occurred prior to entry of the plea.[4] The question is

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[4]The pervasiveness of the holding in *Tollett* was somewhat limited by two subsequent decisions. In *Blackledge v. Perry*, 417 U.S. 21 (1974), the Court held that a guilty plea did not bar a prisoner's complaint that his conviction violated due process concerning "the right not to be haled into court at all...." *Id.* at 30. One year later the Court decided that a guilty plea did not bar a prisoner's double jeopardy claim. *Menna v. New*

(footnote continued)

whether this rule of preclusion should apply when a fourth amendment claim, which could not in most instances be raised in a federal habeas petition, is presented in a § 1983 suit. Two values conflict here; the interest, discussed above, in affording this plaintiff access to the § 1983 forum and the "waiver" effect attendant to a guilty plea adverted to by the *Tollett* Court. Certainly a claim of illegal search and seizure is the kind of non-jurisdictional defect that a defendant may not thereafter assert in a habeas corpus petition under *Tollett*. As the Court later explained in *Menna v. New York*, 423 U.S. 61, 62-63 n. 2 (1975) (per curiam), a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established."

Recent decisions of the Supreme Court establish beyond doubt that search and seizure claims are unrelated to the existence of "factual guilt." *Stone v. Powell, supra* at 489-90; *United*

(footnote continues)

York, 423 U.S. 61 (1975) (per curiam). *See also United States v. Bluso*, 519 F.2d 473 (4th Cir. 1975); *United States v. Sams*, 521 F.2d 421 (3d Cir. 1975); *Williams v. State of Md.*, 445 F.Supp. 1216 (D. Md. 1978).

States v. Janis, 428 U.S. 433 (1976); *Kaufman v. United States*, 394 U.S. 217 (1969). Notwithstanding the unavailability of the federal habeas forum under *Stone*, therefore, plaintiff's fourth amendment claim would not be cognizable in any event because his plea of guilty foreclosed access to habeas corpus under *Tollett*. It follows that the considerations referred to above that may make appropriate the availability of the § 1983 cause of action because of the preclusive effect of *Stone* do not pertain to cases in which there is the added element of a guilty plea. Plaintiff's guilty plea cut off his access to a federal habeas forum to litigate a fourth amendment claim and at the same time should have a similar effect upon a § 1983 suit. If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*. The Court thus concludes that plaintiff's fourth amendment claim cannot be maintained in this § 1983 action under the reasoning undergirding the *Tollett* decision.

For the foregoing reasons, it is hereby

ORDERED that conditional summary judgment be entered in favor of the defendants on plaintiff's claim of excessive force during arrest; summary judgment becomes final in fifteen (15) days unless plaintiff can show that the defendants' use of force was excessive. Summary judgment will be entered in favor of the defendants on plaintiff's claim of unlawful search and seizure and that claim stands dismissed.

Finally, plaintiff's numerous submissions included an affidavit from his wife, Katherine I. Prosise, that sets forth a claim that she was touched in an offensive manner by Officer Badey. This claim is unrelated to the alleged violation of her husband's civil rights, which is the subject of the suit against the defendants, and therefore must be dismissed without prejudice. Should Mrs. Prosise desire to file suit on her own behalf based on her claim of assault, she is free to do so in a separate action.

The Clerk is directed to send copies of this Order to the plaintiff and to the County Attorney for Arlington County, Virginia.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
April 17, 1979

PLEA AGREEMENT TRANSCRIPT

April 27, 1978

(Begin Transcript page 6)

Whereupon,

DETECTIVE HENRY ALLEN,

was called as a witness by and on behalf of the Commonwealth of Virginia, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELSON:

Q State your name for the court.

A Henry W. Allen.

Q By whom are you employed?

A Arlington County Police Department. I am an officer working in the Narcotics Division.

Q How long have you been in Narcotics?

A Four and a half years.

Q How long have you been a police officer?

A Six years.

Q Directing your attention to September 7, 1977, did you have occasion around 10:00

o'clock to respond to 224 North Glebe Road, Apartment No. 4, in Arlington?

A Yes, I did.

Q Tell us why you responded there and what you found.

A I received a radio call while in the vicinity, to respond to 224 North Glebe Road, Apartment No. 4, and I (Begin Transcript page 7) responded; and there were two uniformed police officers there, and an individual named John Prosise, who had been arrested on a charge which included the possession of a controlled substance.

Q What did that substance turn out to be?

A Phencyclidine.

Q Was that taken to the laboratory?

A Yes, it was.

Q Did you receive a certificate of analysis?

A Yes, sir.

Q May I have this marked as Commonwealth's Exhibit No. 1?

(The above-mentioned certificate was marked as Commonwealth's Exhibit No. 1 for identification.)

BY MR. MELSON:

Q Is this the certificate which you received?

A Yes, sir, it is.

Q And what else occurred while you were at that address of 224 North Glebe Road?

A Upon my arrival, I smelled an odor of ether, and upon looking around, saw some chemicals about the apartment. I observed a quantity of a substance of what I believed to be (Begin Transcript page 8) PCP upon the living room table. At the time, I asked the officer to hold the place secured.

Q Do you know who the occupant of that apartment was?

A John Prosise, and Katherine Eileen Denni.

Q Did you find a lease to the apartment with his name on it?

A Yes, I did.

Q Did there come a time you were issued a search warrant for the apartment of 224 North Glebe Road?

A Yes, I did.

Q What occurred after the search warrant was issued?

A My partner, Detective Petti, and I returned to the apartment at 224 North Glebe Road and executed the search warrant on the premises at approximately 2400 hours on the 7th.

Q What was seized as a result of that search?

A The property Detective Petti and I seized included two jars of cyclohexanone, two jars of cyanide, scales, a four gallon can of Coleman's fuel, two jars of lye, assorted drug paraphernalia, a jar of iodine, a jar of hydrochloric acid, four plastic baggies of suspected PCP, four 8 ounce cans of parsley, two plastic buckets with traces of suspected PCP.

Q (Begin Transcript page 9) Did you mention anything about parsley being found?

A Yes.

Q Were any papers seized during the search?

A Assorted papers, several receipts from Norris Strong Chemical Company in Prince George's County, and customer receipts from supply places or parsley places.

Q Do you recall what was included in one of the two devices you seized?

A Yes, sir, among the personal papers I seized were two devices. One had what I believe to be a formula to make PCP, and it was later confirmed by Dr. Hepner.

Q What were the customer receipts for?

A The customer receipts were for assorted chemicals used in the manufacture of phencyclidine. I transported those to the Northern Virginia Lab, to a Mr. Davis for handwriting analysis.

Q Did they have the defendant's handwriting on it?

A It had John F. Prosise on it, and Mr. Davis confirmed that they were written by Mr. Prosise.

Q Let me show you the two laboratory certificates, these are exhibits 2 and 3. Can you identify what these exhibits are?

((Begin Transcript page 10) The above-mentioned documents were marked Commonwealth's Exhibits No. 2 and 3 for identification.)

A I received these from Mr. Davis in reference to the handwriting samples of the questioned document, and the known handwriting.

Q Did he conclude that the handwriting was that of Mr. Prosise?

A Yes, it does.

Q And the signature on the customer receipt, is that of Mr. Prosise?

A Yes, it is.

Q Did you take the chemicals to the laboratory?

A Yes, I did, I transported them to the Northern Virginia Forensic Laboratory on the 8th of September, the following day.

Q Did you receive, as a result of the analysis, a certificate of analysis?

A I turned the chemicals to Pauline Wagner, and she returned them back to me with an analysis report.

((Begin Transcript page 11) The abovementioned document was marked Commonwealth's Exhibit No. 5 for identification.)

BY MR. MELSON:

Q Let me show you first, Dectective Allen, the report which is marked as Commonwealth's Exhibit No. 5, and ask you what the chemist's second finding was.

A There were two items, one envelope containing a green material; and an item containing a white crystal type material. The chemist report states that item two was what is known as PCC, the intermediate stage of PCP.

Q How many stages are there in the manufacture of PCP?

A Two stages. The end result of the first stage, which is the intermediate, is PCC.

Q Is that what is referred to on the laboratory report?

A Yes, sir.

Q Let me show you Exhibit No. 4. Can you identify this laboratory certificate?

(The above-mentioned document was marked Commonwealth's Exhibit No. 4 for identification.)

A (Begin Transcript page 12) Yes, sir, I can.

Q From whom did you receive that?

A I received that from Pauline Wagner at the Northern Virginia Forensic Laboratory in reference to the chemicals I took out there for analysis.

Q Did she conduct an analysis of the two buckets you seized from the home?

A The two buckets were found to contain PCP.

Q Is that the complete product?

A Yes, sir.

Q Did she confirm the presence of other chemicals that were seized?

A Yes, sir.

Q Were there any other chemicals needed to manufacture PCP that were not seized from the defendant's home?

A Yes, sir, sodium metabisulfite, piperidine, bromobenzene.

Q Are any of the chemicals necessary in the first stage of the operation?

A In the first stage you must have piperidine and sodium metabisulfite may be used.

Q The completed product of the first stage was found?

A Yes, it was.

Q (Begin Transcript page 13) Do you know whether, even though the defendant had completed the first stage, he had ordered an addi-

tional quantity of sodium metabisulfite and piperidine?

A Yes, sir, I have a cancelled receipt from Norris Strong, which states an order was called in and was made for the sodium, the bromobenzene and the piperidine on September 6, 1977.

Q These would not have been needed to complete a batch?

A No.

Q What is bromobenzene used for?

A It is used in the second stage.

Q With the Grignard Reagent?

A Yes, sir, it is.

Q That was also ordered by the defendant?

A Yes, sir.

Q In that same order?

A Yes, sir.

Q When was the order made?

A September 6, 1977, and it was cancelled December 6.

Q You referred also to one of the items as being parsley?

A Yes, sir.

Q (Begin Transcript page 14) Did you find any tickets referring to an order for parsley?

A I found a copy of an order from Atlantic issued for four cases, each case containing six 8 ounce cans of parsley.

Q How many pounds is that?

A Twelve pounds.

Q How many?

A Twenty-four 8 ounce cans, 12 pounds.

Q You didn't find 10 pounds there?

A I did not.

Q Did you find any empty cases?

A I did not.

Q Do you know how much of the intermediate stage was first found by weight?

A 82.5 grams in the intermediate stage.

Q How much PCP could be made from that?

A In discussing it with Dr. Hepner at the Northern Virginia Laboratory, using the formula, he estimated it would produce 2.2 pounds, roughly.

Q Is PCP then spread over parsley?

A Yes, sir.

Q When you are saying 2.2 pounds of PCP, or 2.2 pounds of killer weed, why is the parsley used?

A (Begin Transcript page 15) In the final product it is spread over the parsley. The total amount that was seized was calculated that it would have produced about 44 grams of a finished product of PCP.

THE COURT: That is not 44 grams treated with parsley.

THE WITNESS: No, sir.

THE COURT: Do you know the amount of PCP, how much would be needed to treat it with parsley?

THE WITNESS: Dr. Hepner said 44 grams could be treated with two pounds of parsley.

BY MR. MELSON:

Q How much parsley did you find?

A Twelve pounds.

Q What is the estimated, from your experience, the market value on the street of parsley treated PCP?

A It would go from $1500 to $1700 a pound.

Q Did you mention that a 3-A triple beam balance scale was found?

A Yes, sir.

Q And is the person you are referring to John Franklin Prosise --

MR. RODWAY: (Interposing) We stipulate it is him.

MR. MELSON: (Begin Transcript page 16) We have no further questions.

MR. RODWAY: We have no questions.

MR. MELSON: There supposedly has been filed with the court copies of the originals, and if we can substitute them, I would like permission to retrieve the others.

THE COURT: I don't see the file here.

MR. MELSON: I think they are in the clerk's office in an accordian file. So, I introduce these as the copies here, and the others are the originals.

THE COURT: Let me have these. If he can have your permission to receive these --

MR. RODWAY: (Interposing) Yes, sir.

THE COURT: All right, they are received in evidence, and the copies that are in the clerk's office may be released to the Commonwealth Attorney.

(The documents marked Commonwealth's Exhibits 1 to 5 were received in evidence.)

Does the Commonweaitn have any further evidence?

MR. MELSON: No, sir.

THE COURT: Does the defense wish to present any evidence?

MR. RODWAY: No, sir.

THE COURT: (Begin Transcript page 17) The court finds the plea of guilty to be voluntarily and intelligently tendered and finds there is a sufficient factual basis; and upon the evidence heard this morning, the court finds the defendant guilty of the manufacture of phencyclidine as charged in the indictment C-12689.

Do you request a presentence report?

MR. RODWAY: Yes, sir.

THE COURT: No sentence is imposed at this time, and the case is referred to the Probation Parole Office for the preparation of a presentence report.

MR. RODWAY: He was born in Arlington and he has lived here on and off. He was in the military, and in essence he has lived a long

residence in this area, though I can't say everyone of his family was born here. His family moved away and then came back. His mother came back. He has not been any trouble.

THE COURT: June 9?

MR. MELSON: That is fine with the Commonwealth.

MR. RODWAY: Yes, sir.

THE COURT: This case is continued to June 9 for sentencing, subject to a presentence report.

Do you have a motion with respect to 12951?